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No. 98-1620

In the Supreme Court of the United States

IN RE JOSEPH D. MORRISSEY, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a lawyer may be convicted of criminal contempt for making statements in violation of a district court's rules when the statements posed a reasonable likelihood of interfering with a fair trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 168 F.3d 134. The opinion of the district court (Pet. App. 15-39) is reported at 996 F. Supp. 530.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1999. A petition for rehearing was denied on March 10, 1999 (Pet. App. 40). The petition for a writ of certiorari was filed on April 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on two counts of criminal contempt, in violation of 18 U.S.C. 402. He was sentenced to 90 days' imprisonment, to be followed by three years' probation. The court of appeals affirmed. Pet. App. 1-13.

1. In January 1997, petitioner, a lawyer, was representing Joel W. Harris on state drug charges.

Because of Harris's political connections, the case attracted substantial media attention, and eventually the case was referred to federal authorities. Pet. App. 2-3. In the interim, petitioner hired James Bates, an investigator, to assist in his trial preparation. Petitioner interviewed John Buerkley, one of the witnesses who had testified before the state grand jury. In a videotaped interview, Buerkley recanted much of his state grand jury testimony. Petitioner was aware that Buerkley would be called as a government witness during trial. *Id.* at 2-3.

Two days after the Buerkley interview, Harris was indicted on federal drug charges. The indictment alleged that Harris exchanged drugs for sex. Those allegations resulted in renewed media interest in the case. On the day that Harris was indicted, the Assistant United States Attorney assigned to the case, James Comey, sent petitioner a copy of the indictment and a copy of Local Rule 57, which restricts a lawyer's extrajudicial comments about a pending case.[1] Pet.

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[1] Local Rule 57 provides in pertinent part:

(A) *Potential or Imminent Criminal Litigation*: In connection with pending or imminent criminal litigation with which a lawyer or a law firm is associated, it is the duty of that lawyer or firm not to release or authorize the release of information or opinion (1) if a reasonable person would expect such information or opinion to be further disseminated by any means of public communication, and (2) if there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice.

* * * * *

(C) *Pending Criminal Proceedings—Specific Topics*: From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the termination of trial or disposition without

App. 3. Comey sent the local rule to petitioner because petitioner "had a reputation for aggressive use of the media in high-profile cases, and because comments similar to the ones that [petitioner] had previously made during the state proceedings would be prohibited in federal court under this rule." *Ibid.*

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trial, a lawyer or a law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be further disseminated by any means of public communication, if such statement contains:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status and, if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his or her apprehension or to warn the public of any dangers such person may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make a statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

E.D. Va. R. Crim. Pro. 57.

On the morning of February 11, 1997, a lawyer representing another potential witness against Harris telephoned petitioner and cautioned him against approaching the witness for an interview. Petitioner indicated that he had scheduled a press conference for later that day and planned to show the videotape of Buerkley's interview, in which Buerkley recanted his state grand jury testimony. Pet. App. 3. Petitioner also told his investigator and Buerkley's attorney of the press conference. Both men discouraged petitioner from holding the press conference. The prosecutor also learned of the scheduled press conference and faxed petitioner a letter urging him to cancel the event. The letter also again cited Local Rule 57. *Id.* at 3-4.

Petitioner went ahead with the press conference, made a statement, presented a press release, and played the videotape of Buerkley's recantation. Petitioner responded to the prosecutor's letter later in the day. Petitioner stated that he had consulted with three former prosecutors and that, based on their conversations, he had decided to hold the press conference. Pet. App. 4.[2] Petitioner also argued that his statements to the media dealt only with the state case, even though all state charges against Harris had been dismissed at that point. Petitioner had intended that the press conference would "send a message to the other witnesses," *ibid.*, and several potential witnesses were indeed upset by petitioner's actions. One potential witness threatened to recant his testimony just so that he would not have to testify at Harris's trial. *Ibid.*

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[2] Later, during the hearings on the contempt citations against petitioner, the three lawyers denied that they had advised petitioner to go ahead with the press conference. Pet. App. 4.

The next day, the district court issued a show cause order against petitioner. The order charged petitioner with violating Local Rule 57 by holding a press conference to discuss a prospective government witness in a pending criminal case and to distribute a videotaped statement in which the witness allegedly recanted incriminating statements made to the government. Pet. App. 4-5, 24. At the show cause hearing, the district court reminded both parties of Local Rule 57; the court stated that it would impose harsh punishments for future violations. *Id.* at 5.

Thirteen days later, and some two weeks before trial, petitioner made statements about the Harris case in an interview with a Richmond newspaper reporter. Petitioner characterized the charges against Harris as vindictive and vicious; he said that if he had brought such charges when he was a prosecutor, they would have been laughed out of court. Pet. App. 5. Those statements resulted in a second charge of willfully violating Local Rule 57. *Ibid.*

2. Petitioner moved to dismiss the two charges on the ground that Local Rule 57 violated the First Amendment. The district court denied that motion and held a trial on the charges. The court found that petitioner had knowingly violated Local Rule 57(C)(4) and (C)(6), which prohibit lawyers from making public statements regarding the identity, testimony, or credibility of prospective witnesses, or from giving any opinion as to the merits of a pending case. The court found that petitioner's actions were reasonably likely to taint the jury pool, to make jury selection more difficult, and to interfere with prospective witnesses. Pet. App. 5.

3. The court of appeals affirmed. Pet. App. 1-13. Petitioner argued that Local Rule 57 is facially un-

constitutional because it allows for a greater restriction on a lawyer's actions than is permitted under *Gentile* v. *State Bar*, 501 U.S. 1030 (1991). The court of appeals held that Local Rule 57 is valid under the court's previous ruling in *Hirschkop* v. *Snead*, 594 F.2d 356 (4th Cir. 1979), and that *Gentile* had not overruled *Hirschkop*. The court below recognized that in *Gentile*, this Court affirmed a rule that prohibited extrajudicial comments that had a "substantial likelihood" of a materially prejudicial effect. Pet. App. 10, citing *Gentile*, 501 U.S. at 1075, 1082. The court below pointed out, however, that this Court's opinion in *Gentile* did not hold that the "substantial likelihood" standard is the minimum constitutionally permissible standard. The court of appeals accordingly held that *Gentile* had not addressed the question presented in this case. Pet. App. 10-11.

The court of appeals then reaffirmed its conclusion in *Hirschkop* "that the 'reasonable likelihood' standard is sufficiently narrowly tailored to pass constitutional muster and was constitutionally applied to [petitioner]." Pet. App. 11. The court recognized that content-based restrictions on attorney speech are permissible only when the restrictions "are no greater than necessary to protect an accused's right to a fair trial or an impartial jury." *Ibid.*, citing *Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974). The court had no doubt that the local rule furthered a compelling state interest. The only question, according to the court, was whether the restriction on lawyer speech was sufficiently tailored "to be no greater than necessary to protect the government interest involved." Pet. App. 12. The court was of the view that Local Rule 57's "restrictions on [petitioner's] First Amendment rights * * * are both narrow and necessary. Local Rule 57 is narrow in that it prohibits

only the statements that are likely to threaten the right to a fair trial and an impartial jury." *Ibid.*

The court found that Rule 57 is consistent with *Gentile*, because that case recognized that limitations on lawyer speech should be "aimed at the two evils that threaten the integrity of the judicial system." Pet. App. 12. Those evils are "(1) comments that will likely influence the outcome of a trial and (2) statements that will prejudice the jury venire even if an untainted jury panel can eventually be found." *Ibid.* (citing *Gentile*, 501 U.S. at 1075). In the court's view, petitioner's press conference was likely to influence the outcome of Harris's trial, because petitioner attacked the credibility of a key witness in Harris's case. Similarly, petitioner's later statements cast doubt on the merits of the government's case. According to the court below, those are precisely the types of behavior that this Court in *Gentile* said should be prohibited. *Ibid.* Finally, the court of appeals found that Local Rule 57 is neutral as to points of view and applies equally to all attorneys in a case, and it therefore passes muster under *Gentile*. *Id.* at 12-13.

ARGUMENT

Petitioner contends that the "reasonable likelihood of interference" standard employed by the court of appeals conflicts with *Gentile* and is not sufficient to protect a lawyer's First Amendment rights. Those claims are incorrect.

1. In *Gentile*, a lawyer who had been disciplined for extrajudicial statements challenged a state bar rule that forbade extrajudicial communications by attorneys that would have a "substantial likelihood of materially prejudicing an adjudicative proceeding." 501 U.S. at 1060. This Court held that "the speech of lawyers

representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press[.]" *Id.* at 1074. Balancing the attorney's First Amendment interests "against the State's legitimate interest in regulating the activity in question," the Court concluded that the state bar rule was constitutional because it was "designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech." *Id.* at 1075.

The Court noted that the rule was designed to protect against "comments that are likely to influence the actual outcome of the trial," and "comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found." 501 U.S. at 1075. The Court concluded that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Ibid.* The Court therefore found the bar rule was "supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity." *Id.* at 1076.

The Court also held that the state bar rule was sufficiently tailored to achieve its objective. It applied "only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial." 501 U.S. at 1076. Therefore, the Court held that the state bar rule was constitutional.

2. Local Rule 57 is constitutional under the analysis set forth in *Gentile*. It is narrowly tailored to accom-

plish its goals. It itemizes six categories of statements by counsel that are uniquely likely to harm the right to a fair and impartial jury trial. Further, a statement runs afoul of Rule 57 only if there is a reasonable likelihood that a statement in one of the six categories actually would interfere with a fair trial or the due administration of justice. Thus, the trivial and technical are excluded from the rule. As in *Gentile*, the rule is neutral as to point of view, and its strictures apply only to counsel during the pendency of a criminal action. Moreover, the rule has a list of statements that are excluded from its coverage, including reference to public records of the court.

a. Petitioner argues (Pet. 10, 17-18) that the local court rule at issue here is unconstitutional because it prohibits comments to the media by an attorney "if there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice." In petitioner's view (Pet. 6-9), the Court in *Gentile* set "substantial likelihood"—not "reasonable likelihood"—of prejudice as the constitutional minimum in this setting, and Local Rule 57 is therefore unconstitutional.

Petitioner is mistaken that *Gentile* set a constitutional floor for the standard that may be employed to govern extrajudicial statements by attorneys. Before proceeding to its analysis in *Gentile*, the Court recognized that eleven States had adopted the "reasonable likelihood of prejudice" standard and that that standard was "less protective of lawyer speech" than the rule at issue in *Gentile*. 501 U.S. at 1068. See also *id.* at 1067 (discussing history of "reasonable likelihood" standard). Nonetheless, the Court did not there or elsewhere suggest that the rule in those eleven States is unconstitutional. To the contrary, each of the Court's statements

of its holding made clear that it was holding the Nevada rule constitutional, not adjudicating a challenge to any other rule with a different formulation. As the Court stated, "the 'substantial likelihood of material prejudice' standard constitutes *a*"—not *the*—"constitutionally permissible balance." *Id.* at 1075 (emphasis added). See also 501 U.S. at 1063 ("We conclude that the 'substantial likelihood of material prejudice' standard applied by Nevada and most other States satisfies the First Amendment."); *id.* at 1082 (O'Connor, J., concurring) ("[T]he 'substantial likelihood of material prejudice' standard * * * passes constitutional muster.").[3]

Moreover, the difference between the "substantial likelihood" standard before the Court in *Gentile* and the "reasonable likelihood" standard at issue in this case does not change the result of the constitutional analysis. Under both standards, statements by attorneys that are unlikely to interfere with a trial are fully protected. And under both standards, attorneys may comment on cases unless there is a likelihood—not a mere possibility or conjecture—of such interference. Finally, the difference between a "reasonable" likelihood and a "substan-

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[3] The "reasonable likelihood" test is not an archaic or aberrant standard. Not only is it followed by a substantial number of States, it also is widely used by federal district courts. See Pet. 25. And, contrary to petitioner's suggestion (Pet. 27, citing *U.S. Attorney's Manual* (1997)), it is embodied in Department of Justice regulations as well. See 28 C.F.R. 50.2(b)(2) ("At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information *may reasonably be expected* to influence the outcome of a pending or future trial.") (emphasis added).

tial" likelihood is not great. Indeed, petitioner's conduct would have been subject to sanction under either standard. Balancing the factors that the Court considered in *Gentile*, a court may prevent attorneys who appear in a given case from engaging in conduct that has a "reasonable likelihood" of subverting the court's ability to conduct a fair trial.

b. Petitioner also argues (Pet. 29) that "lawyers *should* have the right to freely discuss cases in the media, to participate in today's predictable rough-and-tumble rituals of sniping charges and counter-charges, posturing and protesting, unless the prospect of some *substantial likelihood* of *material prejudice* to the pending proceeding is actually demonstrated." This Court's decision in *Gentile*, however, makes clear that such attempts by attorneys to influence prospective jurors are highly corrosive of our system of justice and are subject to regulation. The Court in *Gentile* noted that "our criminal justice system is founded" on the theory that "[t]he outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding." 501 U.S. at 1070. As the Court explained, "[e]xtrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet." *Ibid.* See also *Gentile*, 501 U.S. at 1072 ("Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.") (emphasis omitted) (quoting *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966)). A court may constitutionally determine that attorneys appearing before it

should be prohibited from making statements that are "reasonably likely" to interfere with that "basic tenet."

c. Petitioner claims (Pet. 12-15) that the use of the term "reasonable likelihood" in Local Rule 57 establishes a low test of mere "rationality" that is inappropriate for the regulation of attorney speech. The court of appeals did not endorse a highly "permissive" (Pet. 14) restriction of speech, however. The court of appeals noted that the interest in fair and impartial criminal trials is not merely "substantial," but a "compelling state interest," Pet. App. 12, and it found that "[t]he restrictions on [petitioner's] First Amendment rights as imposed by Local Rule 57 are both narrow and necessary," *ibid.* The court of appeals did not suggest that suppression of speech is permissible on a highly relaxed showing.

Petitioner also argues (Pet. 17) that the affirmance of his conviction in this case "demonstrates how low a standard Local Rule 57 truly is." Petitioner, however, deliberately set out to hold a press conference, distribute a press release, and display and distribute a videotape in order "to send a message to other witnesses" in his client's case. Pet. App. 4, 24.[4] A week later, the

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[4] Petitioner argues (Pet. 26) that the varying standards applied by different jurisdictions to extrajudicial statements by attorneys create a "dissonance" that "undoubtedly surfaced in [this] case, in which the prosecution of [petitioner's] client initially commenced within the Virginia state system, one of the states that applies the 'clear and present danger' test." Petitioner's conduct could not be justified by any such "dissonance," however. Petitioner acted with full knowledge of the requirements of Local Rule 57, since the Assistant United States Attorney had sent him a copy of the rule and followed it up with a letter informing him of its contents before petitioner held his press conference, issued his press release, and released the videotape of the witness. See Pet. App. 3-4. In any event, petitioner's theory of the case would not eliminate

trial judge stated at a hearing that "I want it understood here on out that this case will not be tried in the media" and that "any infractions of that admonition will be met with a harsh result." *Id.* at 25. Nonetheless, on April 1, just two weeks before trial was scheduled to begin on April 14, see Gov't C.A. Br. 12, petitioner again had an interview with a reporter in which he once again violated Local Rule 57 with statements that "the charges never should have been filed" and he "would have laughed [the case] out of court" when he headed the state prosecutor's office. Pet. App. 25. In light of the seriousness of petitioner's first violation and the proximity of his second violation to the scheduled trial date, both courts below correctly concluded that "these actions are precisely the types of behavior that the Court in *Gentile* was concerned about and thought could and should be prohibited." *Id.* at 12; see also *id.* at 34.[5]

3. Contrary to petitioner's contention (Pet. 23-24), the decision of the Fourth Circuit does not conflict with any decision of any other court of appeals.[6]

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disparities in standards. Under *Gentile*, federal courts could plainly adopt a "substantial likelihood" test, even if Virginia adheres to a higher "clear and present danger" test.

[5] Petitioner emphasizes (Pet. 17) the fact that petitioner received a sentence of sixty days' imprisonment for his comments to the reporter two weeks before the scheduled trial date. The sentence was imposed not merely for those comments, in isolation, but also for petitioner's "willful[], deliberate[], and contumacious[]" violation of Local Rule 57 "after having been admonished by [the trial court] to act in conformity with Local Rule 57(C) and not to try the case in the press." Pet. App. 38.

[6] In *United States* v. *Cutler*, 58 F.3d 825 (1995), the Second Circuit construed a local rule similar to Local Rule 57 to require a showing that extrajudicial statements by an attorney that fall within six specific categories must also satisfy a "reasonable

a. Petitioner argues (Pet. 23) that the decision of the Fourth Circuit conflicts with the Seventh Circuit's decision in *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 249 (1975), cert. denied, 427 U.S. 912 (1976). That claim is mistaken, because the holding in *Bauer* on which petitioner relies was overruled by this Court in *Gentile*.

In *Bauer*, the Seventh Circuit held that a local court rule that, like Local Rule 57, prohibited attorneys from making extrajudicial statements "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice" violated the First Amendment. 522 F.2d at 249. The Seventh Circuit held that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed." *Ibid.* In *Gentile*, sixteen years later, this Court noted that some jurisdictions had adopted the "serious and imminent threat" standard, see 501 U.S. at 1068 n.3, and it characterized that standard as one that "arguably approximate[s] 'clear and present danger.'" *Id.* at 1068. The Court then rejected the argument that an attorney's extrajudicial comments may be regulated only if they satisfy

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likelihood of interference" standard. *Id.* at 835-836. In reaching that conclusion, the court stated: "We see no need to adopt an interpretation of [the local rule] that might offend the Constitution. Accordingly, we conclude that speech falling within the six categories violates [the local rule] only if it is also reasonably likely to interfere with a fair trial or the administration of justice." *Id.* at 835. Although the court was not addressing a claim that the Constitution requires a "substantial likelihood"—rather than a "reasonable likelihood"—minimum, the Court's apparent conclusion that the "reasonable likelihood" standard would be constitutional is consistent with the Fourth Circuit's decision in this case.

that "clear and present danger" test, holding that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard." *Id.* at 1074. Because *Gentile* explicitly rendered this holding in *Bauer* obsolete, the Seventh Circuit has not cited *Bauer* for the proposition that a "reasonable likelihood" standard is unconstitutional since this Court decided *Gentile*. There is accordingly no present conflict between the Fourth and Seventh Circuits.

b. Petitioner also contends (Pet. 23) that the decision in this case conflicts with the Ninth Circuit's decision in *United States* v. *Wunsch*, 84 F.3d 1110 (1996). That decision, however, did not address the constitutionality of a "reasonable likelihood" standard, and it accordingly does not conflict with the Fourth Circuit's decision in this case.

In *Wunsch*, a male defense attorney had been disqualified and then wrote a letter containing sexist remarks to the female prosecutor. The Ninth Circuit held that "there has been no showing that [the defense attorney's] action adversely affected the administration of justice within the meaning of" a state rule providing that "[n]o attorney shall engage in any conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice therein." 84 F.3d at 1116-1117. The court's opinion—which rested in pertinent part on the conclusion that the letter did not violate the terms of the state rule—did not resolve any question regarding the proper First Amendment analysis of restrictions on extrajudicial statements by attorneys. The court's opinion in *Wunsch* did include a "cf." citation to *Gentile*, coupled with a parenthetical stating that "in order to satisfy the First Amendment, there must be facts showing a 'substantial likelihood of material prejudice'

to an adjudicative proceeding before a lawyer may be disciplined for extrajudicial comments." *Id.* at 1117. But the Ninth Circuit did not have before it any claim that a "reasonable likelihood" standard would be constitutional, and its brief parenthetical reference to *Gentile* cannot be taken as a holding that a "reasonable likelihood" standard like that in Local Rule 57 would be unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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